

EARL CLAUSEN, d.b.a. EARL CLAUSEN FARMS, INC.
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-111-A

Decided November 14, 1990

Appeal from a decision concerning the granting of an agricultural lease.

Affirmed.

1. Indians: Lands: Tribal Lands--Indians: Leases and Permits:
Negotiated Leases

The Bureau of Indian Affairs does not have authority to negotiate a lease of tribal land.

2. Administrative Procedure: Standing--Indians: Generally--Indians:
Trust Responsibility

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

3. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Discretionary Decisions--Indians: Leases
and Permits: Farming and Grazing

Decisions concerning the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

4. Indians: Tribal Powers: Tribal Sovereignty

A tribal court decision concerning the condemnation of an undivided nontrust interest in an Indian allotment is not reviewable by the Board.

APPEARANCES: Corinne Y. Diteman, Esq., Tekoa, Washington, for appellant; Colleen Kelley, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Raymond C. Givens, Esq., Coeur d'Alene, Idaho, for the Coeur d'Alene Tribe of Idaho.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Earl Clausen, d.b.a. Earl Clausen Farms, Inc., seeks review of a May 31, 1990, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning the granting of an agricultural lease on Coeur d'Alene Allotment No. 400. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant is a non-Indian who owns an undivided 1/12 nontrust interest in Coeur d'Alene Allotment 400, described as the NE¼, sec. 31, T. 47 N., R. 5 W., Boise Meridian, Kootenai County, Idaho, containing 160 acres more or less (Allotment 400). The undivided 1/12 interest passed out of trust status when it was inherited by Lena M. Gay, a non-Indian. The Bureau of Land Management issued patent No. 1212863 to Ms. Gay on September 20, 1960. Appellant purchased the interest from Ms. Gay.

Appellant states that he has farmed Allotment 400 and the surrounding land since 1954. He obtained agricultural Lease No. 7348-85-89 on Allotment 400, effective January 1, 1985. The 5-year term of the lease expired on December 31, 1989. Sometime in 1989, appellant and Daniel Hopson, d.b.a. Evergreen Land Company, each began negotiations for a new lease with the undivided interest owners. Both appellant and Hopson received signatures from some of the owners. In March 1989, the Coeur d'Alene Tribe of Idaho (tribe), which holds an undivided 13,608/36,288 trust interest in Allotment 400, determined to lease its interest to Hopson. ^{1/} By letter dated August 17, 1989, and signed by a realty specialist with the Northern Idaho Agency, BIA (agency), appellant was notified that he would not be granted a new lease.

Appellant appealed this letter to the Northern Idaho Agency Superintendent (Superintendent) on August 23, 1989. When he did not receive a decision from the Superintendent, appellant filed an appeal with the Area Director on October 4, 1989. By letter dated December 29, 1989, the Area Director concluded that, although the agency had selected a new lessee and had assigned the lease a number, the lease had not yet been approved. Accordingly, the Area Director remanded the matter to the Superintendent for "a decision as to who will be granted this lease" (Letter at 4). The Area Director noted, however:

^{1/} On Oct. 4, 1990, the Board received a motion from the tribe seeking to intervene in this proceeding. As an owner of an undivided trust interest in Allotment 400, the tribe is a party to this proceeding. As such, it does not need to be granted the right to intervene.

Coeur d'Alene Allotment 400 is owned by nineteen (19) different owners. Your [appellant's] interest in the allotment is 3024/36288 or 0.08333. The Coeur d'Alene Tribe has an undivided 13608/36288 (0.3750) interest in the allotment. Although the Code of Federal Regulations gives authority to the Secretary [of the Interior] to grant leases on behalf of certain individuals, no authority is provided over nontrust (fee) or for tribal land. For the case at hand, the Bureau cannot grant a lease on your behalf or for the Coeur d'Alene Tribe. The Tribe has indicated that they want Dan Hopson as a lessee. If the Superintendent were to grant a lease to Mr. Hopson, Mr. Hopson would have to obtain consent from you for your interest.

On April 2, 1974, the Pacific Northwest Regional Solicitor's Office issued an opinion on a similar situation. They indicated that "If the trust and nontrust owners disagree as to the proper management of the land, we know of no orderly means of resolving the disagreements." The Solicitor indicates that in a situation such as this, "The Superintendent would be unable to give a lessee the quiet possession of land over the objections of the nontrust co-owner." The regulations have not changed with respect to this situation since the issuance of the 1974 Solicitor's Opinion.

This office requested that the Northern Idaho Agency contact the Coeur d'Alene Tribe to determine if an amicable resolution to this problem could be obtained. The Tribe did not change their opinion and they are still of record as wanting Dan Hopson as a lessee. Unless you can convince the Tribe that you should be a lessee, it appears that the Superintendent will not be able to issue a lease to you on this property.

(Letter at 3).

Appellant filed a notice of appeal from this decision with the Board. Upon the Area Director's motion, the Board dismissed the appeal as premature, in order to permit BIA to render a final decision in the matter. Clausen v. Portland Area Director, 18 IBIA 185 (1990).

On April 6, 1990, the Superintendent approved Lease No. 7761-90-94, covering an undivided 33,264/36,288 trust interest in Allotment 400, to Hopson. The lease did not cover appellant's 3,024/36,288 (1/12) undivided nontrust interest. By letter dated April 26, 1990, appellant appealed this decision to the Area Director, who, on May 31, 1990, affirmed the Superintendent's granting of the lease to Hopson.

Appellant appealed this decision to the Board. Briefs were filed by appellant and the Area Director. In addition, the tribe has made several filings, including the motion to intervene referenced in note 1, supra; motion for copy of transcript; 2/ motions to dismiss and for ex parte order of immediate implementation or, in the alternative, for bond;

2/ The Board does not know what "transcript" the tribe seeks. There is no transcript in the administrative record.

and a request for evidentiary hearing. The tribe also filed a copy of a decree vesting title and order to show cause regarding surrender possession in Coeur d'Alene Tribe of Idaho v. Earl M. Clausen, Cause No. CI91-013 (Coeur d'Alene Tribal Court Oct. 12, 1990). The Area Director filed a motion for expedited consideration, stating that a very volatile situation existed with respect to Allotment 400 because both appellant and Hopson claimed the right to be on the property. Expedited consideration is granted. 3/

Discussion and Conclusions

Appellant raises four arguments on appeal: (1) whether the negotiation process involved in granting Lease 7761-90-94 to Hopson was flawed in that BIA did not perform its duty to negotiate the lease as provided in 25 CFR Part 162; (2) whether, in the alternative, appellant should be awarded possession of the property for 1990 or until the issuance of a final decision; (3) whether the BIA improperly delegated or exercised its authority to negotiate leases of trust property to the tribal council; and (4) whether the award of a lease to Hopson constitutes a taking of appellant's property in violation of the Fifth Amendment to the United States Constitution.

Appellant first challenges the process of negotiating the new lease. Appellant argues that BIA's decision to award the lease to Hopson was made without the tribal council's being fully informed about the number of other undivided interest owners who wished to lease their interests to appellant, and BIA breached its fiduciary duty by failing to accept his lease offer, which he alleges was in the best interest of the Indian owners.

The first part of this argument is based upon appellant's allegation that information was withheld from the tribal council by a tribal council employee who was also an undivided interest owner in Allotment 400. There are several problems with this argument.

[1] Initially, even if the negotiations here were being conducted under 25 CFR 162.2(a)(4), 4/ as appellant alleges, that section is permissive, not mandatory. There is no point in time at which BIA is required to step into the negotiations. The evidence here is that in March 1989 appellant and Hopson were still actively engaged in attempting to negotiate a lease which BIA did not award until April 1990. Furthermore, the

3/ Because of the Board's disposition of this case, all remaining pending motions are denied.

4/ Section 162.2(a) provides:

"The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date upon which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees." (Emphasis added.)

Section 162.6(c) further provides that the Secretary may negotiate leases for lands upon which he may grant leases under sec. 162.2.

tribe was the largest undivided interest owner. BIA does not have authority to negotiate a lease of tribal land. ^{5/} Thus, BIA would have been involved in ultra vires action if it had been negotiating a lease of the tribe's undivided interest in Allotment 400.

In addition, appellant is complaining about the alleged actions of a tribal council employee, not a BIA employee. If true, the alleged actions would have resulted in the tribal council being unaware of the exact number of undivided trust interest owners who had indicated a desire to lease their interests to appellant. Because in March 1989 appellant was still attempting to negotiate a lease, it was his responsibility, not BIA's, to ensure that the tribal council had accurate information. BIA is not responsible for the actions of a tribal council employee or of another undivided interest owner. Furthermore, even if the tribal council had made its determination in favor of Hopson on the basis of incomplete information, BIA's decision to award the lease to Hopson was not made until April 1990. Thus, the tribal council had over a year to review and/or change its determination, but failed to do so. This failure to act strongly suggests that the number of other undivided interest owners willing to lease to appellant was not an important factor in the tribal council's March 1989 determination.

[2] The second aspect of appellant's argument concerning the lease negotiations is that BIA breached its fiduciary duty by failing to award the lease to him because his lease offer was in the best interest of the Indian owners. Appellant is non-Indian and, as such, is not a beneficiary of the Federal trust responsibility. Quiver v. Deputy Assistant Secretary - Indian Affairs (Operations), 13 IBIA 344 (1985). He lacks standing to raise an alleged violation of that trust responsibility.

[3] Even if the Board were to reach this issue, BIA's decision to lease the undivided trust interests in Allotment 400 is reasonable based upon the facts set forth in the administrative record and appellant's own admission. See Appellant's Opening Brief at 6. BIA's granting of a lease is a discretionary action. The Board has repeatedly stated that in reviewing BIA discretionary decisions it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. See, e.g., HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222 (1990). BIA's granting of the lease to Hopson was a reasonable exercise of its discretionary authority.

Appellant's second argument is that he should be allowed to remain on the property for 1990 or until the issuance of a final decision. Appellant contends that he planted a winter wheat crop for 1990 harvest in the fall of 1989, when he was not required to surrender possession of the property in accordance with paragraph 25 of his lease. ^{6/} Appellant alleges that, when

^{5/} See 25 CFR 162.2 for the situations under which BIA has authority to negotiate and grant leases of trust or restricted property.

^{6/} Paragraph 25 provides:

"SURRENDER CLAUSE PERMITTING FALL SEEDING SMALL GRAIN - It is understood and agreed that upon written demand by the Superintendent,

he did not receive notice to surrender the property under that paragraph, he proceeded to plant winter wheat in order to protect the interest of the owners and continue the farming cycle.

Appellant was on notice when he planted a winter wheat crop that there were serious questions concerning the leasing of the property. He was additionally aware that his lease expired by its own terms on December 31, 1989. Paragraph 25 explicitly states that there was no preference right for appellant to continue as the lessee of this property. Paragraph 25 of the lease required the lessee to surrender bare ground covered by the lease in time for another person to plant a winter crop; it did not grant the lessee a right to be on the property in the spring without a valid lease. By planting a winter wheat crop, appellant assumed the risk that he would not have a valid lease of the property when the crop was ready to be harvested.

Appellant next contends that BIA improperly delegated its decisionmaking authority to the tribe, when, in March 1989, the tribe determined the lease should go to Hopson. This contention misstates the facts. The tribe determined in March 1989 that it wanted to lease its undivided trust interest to Hopson. BIA did not approve a lease until April 6, 1990, after consideration of many factors, including the expressed desire of the tribe to lease its undivided trust interest to Hopson. BIA did not delegate its decisionmaking authority to the tribe.

Appellant's final argument is that the granting of a lease to Hopson violates his Fifth Amendment rights, by taking his property without just compensation. In its October 12, 1990, order, referenced supra, the tribal court ordered the condemnation of appellant's undivided fee interest in Allotment 400. Appellant was given an opportunity to show cause why his interest should not be condemned. This proceeding is still pending in tribal court.

[4] Should the tribal court proceeding result in the condemnation of appellant's nontrust interest in Allotment 400, there would be no arguable Fifth Amendment violation here. Furthermore, a tribal court decision is not reviewable by the Board. See, e.g., Johnson v. Aberdeen Area Director, 12 IBIA 179 (1984).

If, however, the proceeding results in a determination not to condemn appellant's interest, appellant's Fifth Amendment issue would have to be addressed. The argument is based entirely upon an April 23, 1990, letter in which the Superintendent stated: "Your lease No. 7348-85-89 expired on

fn. 6 (continued)

stubble land, or other land in suitable condition for the seeding of fall grain or alfalfa and on which there is no unharvested crop, will be surrendered by the lessee, without cost, five months prior to the expiration of the lease. It is further agreed and understood that nothing contained in this lease will act to give preference rights for a new lease at the expiration of this lease."

December 31, 1989, Provision No. 25 prohibits you from entering the premises. I have instructed the Bureau of Indian Affairs, Law and Order Branch to restrain you or your farm workers from the NE1/4 Sec. 31, T. 47 N., R. 5 W., Boise Meridian." Appellant makes no allegation that he has actually been restrained from entering the property. Assuming arguendo that any such action taken by the Superintendent would have implicated the Fifth Amendment, appellant has not shown that he has in fact been deprived of access to the property.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 31, 1990, decision of the Portland Area Director is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge